Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of State and Local	)	
Governments' Obligation to Approve	)	
Certain Wireless Facility Modification	)	
Requests Under Section 6409(a) of the	)	
Spectrum Act of 2012.	)	WT Docket No. 19-250
	)	
Wireless Telecommunications Bureau and	)	
Wireline Competition Bureau Seek Comment	)	
on WIA Petition for Rulemaking,	)	
WIA Petition for Declaratory Ruling and	)	
CTIA Petition for Declaratory Ruling	)	WT RM-11849

EX PARTE COMMENTS OF THE CITIES OF WILMINGTON, DE; TAKOMA PARK, MD; RYE, NY; ROCKVILLE, MD; PORTLAND, OR; PIEDMONT, CA; LOS ANGELES, CA; KIRKLAND, WA; GAITHERSBURG, MD; CORONA, CA; BROOKHAVEN, GA; BOSTON, MA; AND ANN ARBOR, MI; THE TOWNS OF HILLSBOROUGH, CA AND FAIRFAX, CA; MONTGOMERY COUNTY, MD; KING COUNTY, WA; HOWARD COUNTY, MD; AND THE TEXAS COALITION OF CITIES FOR UTILITY ISSUES

Gerard Lavery Lederer
Joseph Van Eaton
Gail Karish
Andrew McCardle
BEST & KRIEGER LLP
2000 Pennsylvania Avenue N.W., Suite 5300
Washington, D.C. 20006

Counsel for the Localities

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EXECUTIVE SUMMARY

The Commission should not adopt the draft order as released. As there is no evidence that a change is required, it would be wisest to maintain the *status quo.* But if it wishes to move forward, the Commission must conduct an appropriate rulemaking, and consider the impact of the proposed changes on its test for whether a proposed modification "substantially change[s] the physical dimensions" of a wireless tower or base station, 47 U.S.C. §1455 (Section 6409).

The Commission's draft justifies the decision to proceed with a declaratory order based on the claim that the order merely clarifies Section 6409 rules adopted in 2014. In fact, the draft order represents a significant departure from the Commission's 2014 order. Among other things, the draft directly contradicts representations regarding what constitutes a "concealment element" that the Commission made to the U.S. Court of Appeals for the Fourth Circuit in defending its current rules. The proposed approach to "equipment cabinets," which permits addition of an unlimited number of equipment cabinets via a series of "eligible facilities requests," cannot be squared with the Commission's 2014 order, which recognized that allowing repeated changes *would* result in substantial changes that Congress did not permit. The Commission's draft does not acknowledge, or justify the departure from its prior rulings, and for that reason alone would be arbitrary and capricious. As importantly, such changes require a properly noticed rulemaking.

The proposed change to the current rules is not only inconsistent with the Commission's prior orders, it is counterproductive. For example, localities and wireless providers have devoted significant effort to develop designs that permit appropriate deployment of wireless facilities. In many cases, those designs permit shielded wireless facilities to be placed in areas where other utilities are underground, or permit placement in a manner where facilities are not readily visible to the public. To render those approaches (including use of landscaping and other concealment elements) less enforceable or unenforceable forces localities to require designs that may be more

expensive. In addition, the current concealment test is simple to apply, and it permits localities to quickly assess whether a proposed change is an eligible facilities request (or should be treated as an ordinary application). By contrast, the line that the Commission seeks to draw between "concealment conditions" and "aesthetic conditions" mixes the processes and issues that arise in the two types of proceedings. Rather than speeding deployment, the draft order would likely discourage deployment, and complicate proceedings.

This is particularly true given the confusion likely to be generated by the Commission's proposed definition of a stealth facility. The Commission must at the very least be clear that monopoles and similar structures generally are stealth facilities, and that increases in the dimensions of those facilities that change the relative proportions, or result in structures larger or taller than similar structures, do defeat concealment conditions.

Other elements of the draft order, unless clarified, will raise substantive and procedural issues similar to those created by the change to the concealment and equipment cabinet rules. The Commission's discussion of the shot clock is unclear on at least two points. First, it is unclear whether the Commission is proposing to change the existing rule mandating that the applicant submit information required by local forms and local ordinances to trigger the shot clock. Second, the draft's discussion of the eligible facilities request application and applications for other required permits appears to allow an applicant to trigger the shot clock *and* avoid applying for other permits necessary for deployment. If so, the draft order is inconsistent with the Commission's prior orders, which permitted localities to require an company to show that its proposed changes satisfied existing safety codes and related permitting requirements as part of the eligible facilities request review. The draft order is also inconsistent with the small cell order, which seems to require (unless otherwise agreed) that required permits be issued at the

same time as the land use approval associated with small wireless facilities. That requires submission of permit applications *with* an eligible facilities request application.

The draft order is unclear as to whether the Commission is proposing to change its environmental review process – that is, whether it is proposing to make substantive determinations that affect existing NEPA processes. A substantive ruling is not justified.

Third, the Commission has been clear that Section 6409 does not apply to vertical infrastructure owned or controlled by states or localities (including municipally-owned utilities). It said so when adopting Section 6409 rules in 2014, and it distinguished Section 6409 from Section 332 and Section 253 when it adopted its small cell order. The Commission nonetheless provides examples of the application of Section 6409 to vertical infrastructure like street lights. The Commission should be clear that it is not changing its prior ruling with respect to the application of Section 6409 to publicly owned infrastructure. Even with appropriate notice, comment and explanation (all missing here) it cannot change the rule consistent the Communications Act, and the Constitution.

In any case, there has been significant reliance on the 2014 rules, and before changing or clarifying those rules, the Commission must consider the effect of those changes on the reliance interests created by the existing rules. The Commission has not done so.

Perhaps most importantly, the rules interpreting Section 6409 can only permit those changes that do not amount to a "substantial change" in the physical dimensions of existing wireless facilities. When the Commission changes, or even "clarifies" the existing structure, it must consider whether its clarifications will continue to satisfy the statutory standards. The "clarifications" in the draft order will not. Thus, the Commission itself (in the small cell order) recognized a distinction between small wireless facilities and other wireless facilities. Yet, its

draft order would permit modifications that change facilities from "small wireless facilities" to facilities whose size is largely limited by strength of the existing support structure.

The draft order's examples often rely on the assumption that the public will be some distance from a wireless facility (the example of the tree in the forest, or cabling on a stealth facility, are examples). Yet the Commission has suggested that thousands of facilities will be quite close to citizens and their homes. Changes that may be insubstantial on a macro tower will be substantial in the public rights-of-way, particularly in residential areas. A 10-foot increase to a 30-foot utility pole or street light increases size by 33%. The addition of a six-foot appurtenance to a monopole and the attachment of an unlimited number of equipment cabinets can increase the size of equipment cabinets by several hundred percent. For facilities in the public rights-of-way and in residential areas, the Commission's proposed rules *would* allow substantial changes, and the Commission has ample evidence that quite large facilities can grow from application of its rules as "clarified." The Commission did not consider the effect of the clarifications on the statutory standard, but merely considered whether changing the standard would speed deployment. The Commission must revisit its rules, and prevent substantial changes without appropriate review. One possible approach is to adopt a percentage limit on the amount by which any dimension, of any element, of the wireless facility can increase, and to include percentage volumetric limits on the growth of elements of, and of the wireless facility itself. The Commission already has percentage-based models, but its Section 6409 test is undone by absolute standards that allow increases that are inconsistent with existing sizes and proportions. Adopting a new standard will not delay deployment; it will encourage the cooperation that is key to deployment.

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I. INTRODUCTION

The Cities of Wilmington, DE; Takoma Park, MD; Rye, NY; Rockville, MD; Portland, OR; Piedmont, CA; Los Angeles, CA; Kirkland, WA; Gaithersburg, MD; Corona, CA; Brookhaven, GA; Boston, MA; and Ann Arbor, MI; the Towns of Hillsborough, CA and Fairfax, CA; Montgomery County, MD; King County, WA; Howard County, MD; and the Texas Coalition of Cities For Utility Issues (collectively, "Localities") submit these comments in opposition to the draft Declaratory Ruling[1] ("*2020 Draft Order*"), which purports to "clarify" the Commission's rules[2] implementing Section 6409(a) of the 2012 Spectrum Act.[3] The *2020 Draft Order* implements changes in Commission rules that go beyond mere clarifications.[4] Without discussion or even acknowledgement of the problem, these proposed rules would contradict the Commission's prior interpretation of the statute; permit alterations as of right that are, by any reasonable measure, "substantial" changes to existing physical dimensions; and ultimately lead to further confusion for localities, wireless carriers, and infrastructure providers. The problems posed by these proposed rules will hinder, rather than speed, deployment.

For these reasons, and those discussed herein, the Commission should not adopt the *2020 Draft Order*. As there is in fact no evidence that a change is required, it would be wisest for the Commission to maintain the *status quo*. But if it wishes to move forward, it must also consider the impact of the proposed changes on the validity of its underlying test for substantiality and should conduct (as we believe is required) an appropriate rulemaking.

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[1] Declaratory Ruling and Notice of Proposed Rulemaking, Docket No. 19-250, FCC-CIRC 2006-03, (rel. May 19, 2020) ("*2020 Draft Order*").
[2] 47 C.F.R. § 1.6100.
[3] 47 U.S.C. § 1455(a).
[4] Further, the *2020 Draft Order* refers to several findings in the *Small Cell Order* and implicitly adopts them, including the new "effective prohibition" standard. To the extent necessary, we incorporate the objections to the *Small Cell Order* now before the Ninth Circuit in *Sprint Corporation v. FCC*, No. 19-70123.

II. THE *2020 DRAFT ORDER* IS NOT A MERE CLARIFICATION.

The Commission portrays the *2020 Draft Order* as a clarification of existing rules, but it is not. Perhaps most notably, the Commission's proposed rules for concealment and equipment cabinets are inconsistent with the *2014 Infrastructure Order*,[5] and the Commission's representation of that *Order* to the Fourth Circuit in connection with its review of the *2014 Infrastructure Order*.[6] Other portions of the *2020 Draft Order* may create similar conflicts, depending on how the Commission intends for the order to be applied.

A. The Proposed Concealment Rule Would Not Be Consistent with the 2014 Infrastructure Order, As Explained to the Courts.

1. Concealment elements should not be limited to only those used in stealth facilities.

The Commission previously ruled that a modification is a "substantial change" in the physical dimensions of an existing facility if "it defeats the concealment elements of an eligible support structure."[7] The *2020 Draft Order* defines "concealment elements" as "elements of a stealth-designed facility intended to make the facility look like something other than a wireless tower or base station."[8] The *2020 Draft Order* declares that concealment elements are intended to be "confined to those used in stealth facilities."[9]

Contrary to the suggestion in the *2020 Draft Order,* this was not how the Commission defined "concealment element" in the *2014 Infrastructure Order.* That is most evident in the *2020 Draft Order's* discussion of whether a requirement that prohibits a wireless facility from extending above a treeline is a concealment element. The new draft order says that it is not. In

[5] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, WT Docket No. 13-238 and 13-32, WC Docket No. 11-59, Report and Order, 29 FCC Rcd 12865, (2014) ("*2014 Infrastructure Order*").
[6] *Montgomery Cty., Md. v. F.C.C.*, 811 F.3d 121 (4th Cir. 2015) ("*Montgomery County*").
[7] 47 C.F.R. § 1.6100(b)(7)(v).
[8] *2020 Draft Order,* ¶33.
[9] *Id*.

response to arguments that the "concealment element" standard was not adequately protective, the Commission told the Fourth Circuit that the term "concealment element" included just such requirements. The Commission stated: "where an existing tower is concealed by a tree line and its location below the tree line was a consideration in its approval, an extension that would raise the height of the tower above the tree line would constitute a substantial change, and a zoning authority could impose conditions designed to conceal the modified facility."[10] This example was consistent with the *2014 Infrastructure Order*, ¶200, which refers to both "concealed or stealth" facilities.

Rather than explain the proposed change to the Commission's own interpretation of the rule, the *2020 Draft Order* quotes to replies to the *2013 Infrastructure NPRM*.[11] It also argues that the proposed rule or "clarification" is needed because industry commenters said that "some localities construe even small changes to 'defeat' concealment, which delays deployment, extends review processes for modifications to existing facilities, and frustrates the intent behind Section 6409(a)…." (there is little evidence that actually supports that contention, and nothing in the order would limit its impacts to "small" departures from existing concealment requirements).[12] The *2020 Draft Order* does not resolve the contradiction between the Commission's prior example in *Montgomery County* and the statement in the *2020 Draft Order*.

[10] FCC Respondents Brief at 41, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015), 2015, WL 4456506 (July 20, 2015).
[11] *2020 Draft Order*, ¶34 (citing Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, WT Docket No. 13-238 (*2013 Infrastructure NPRM*), City of Alexandria et. al. ("Alexandria") Reply Comments (filed Mar. 6, 2014) at 18-19) ("As localities acknowledged in comments they submitted in response to the *2013 Infrastructure NPRM*, 'local governments often address visual effects and concerns in historic districts not through specific stealth conditions, but through careful placement' conditions.")
[12] *2020 Draft Order*, ¶38.

The Commission's draft order does not justify a dramatic departure from the its own representations to the Court of Appeals.

2. The prior approach was a sensible approach.

Further, a narrow reading of the proposed concealment element language misses the way that cities approach concealment in cooperation with wireless providers.[13]

One example is conditions related to shielding of facilities on verges along the public right-of-way, where shrubbery or bushes may be used to conceal small ground cabinets. Verges are very often so narrow that if the facility becomes larger, the concealment is no longer effective, or must be removed altogether. The same issue could arise with respect to facilities placed among stands of trees, where the facility is virtually invisible to the public, or in parks or other locations where there are significant efforts to provide for connectivity while maintaining the character of the area. Careful placement of a facility can be the main way in which local governments and wireless providers work to address visual impacts. The Commission previously acknowledged that idea in *Montgomery County* but now proposes to reverse course to assert that placement of a non-stealth facility can never be a concealment element and will only be, at most, an aesthetic-related condition under Section 1.6100(b)(7)(vi).

In practice, wireless carriers prefer to avoid installing "stealth" facilities because of the greater costs associated with such deployments.[14] As a result, a locality working in good faith with an applicant may approve a non-stealth tower specifically because it would be concealed by the surrounding trees or other structures. Under the *2020 Draft Order*, the size and positioning of

[13] National League of Cities, et al. Comments (filed Oct. 30, 2019) at 17 ("*NLC Comments*"). ("Concealment elements are not always discrete pieces – the very nature of a site is often a concealment element entitled to Section 6409(a) protection. For example, placement of a facility out of the line of sight of houses, or in a stand of trees, may be an important consideration in the initial approval of a project; allowing changes that defeat that concealment fundamentally changes the impact of the facility.")

[14] *NLC Comments* at 16-17.

the tower would no longer be concealment elements, and a locality may be forced to either require a stealth facility or potentially deny the application altogether (and require the applicant to make an "effective prohibition" showing).

Moreover, as discussed below, by proposing to permit alterations that defeat elements of an installation designed to conceal a facility, the *2020 Draft Order* would effectively permit changes that are "substantial" in the normal meaning of that word. It is one thing, for example, to permit placement of a ground cabinet behind a bush (not even visible in the accompanying picture from an installation in Oakland), and even to allow some expansion of the hidden facilities; and another to argue – as the *2020 Draft Order* effectively does – that adding four cabinets is generally an insubstantial change, whether or not those cabinets can be concealed. The proposed rule cannot be squared with the statutory test.

Fig. 1 - Wireless Installation, Oakland, CA

Another example, more in keeping with the vast number of wireless facilities in the public right-of-way, is to require placement of equipment cabinets or antennas behind signage on a pole (see example below in Figures 2 and 3).

Figs. 2 and 3

As long as it can be concealed, the facility is not visible; but if the Commission treats such facilities as "non-stealth," its current rules would permit the addition of an arm, extending in multiple directions six feet from the pole, as well as an increase in the size and number of attached pieces of equipment (resulting the sort or installation shown below, in Figure 7).

3. *The requirement in the proposed concealment rule related to a locality's prior approval conflicts with ongoing concealment needs*.

The Commission now proposes to require that to qualify as a concealment element, the feature "must have been part of the facility that the locality approved in its prior review."[15] We previously explained the issues with such an approach, including burdens on the localities and the wireless carriers.[16]

The *2020 Draft Order* addresses a portion of our concerns by saying that the:

> clarification does not mean that a concealment element must have been explicitly articulated by the locality as a condition or requirement of a prior approval. Magic words are not needed to demonstrate that the locality consider in its approval that a stealth design for a…facility would look like something else.[17]

The Commission suggests that giving localities the discretion to require new concealment elements not part of the initial approval would be inconsistent with the purpose of Section 6409(a), which is "facilitating wireless infrastructure deployment."[18]

However, the *2020 Draft Order's* proposed position on this topic would likely hamper the goal of facilitating wireless deployment, and its explanation does not ease our prior concerns that we expressed regarding the issues for prior approval and new approvals.[19] Though the *2020 Draft Order* notes that "magic words" are not needed for a concealment element to have been considered in an initial approval, the proposed rule is still problematic because it would create more uncertainty as to whether a certain feature from the initial installation would meet the proposed "part of the prior approval" test.

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[15] *2020 Draft Order*, ¶35.
[16] *NLC Comments* at 18-19.
[17] *2020 Draft Order*, ¶37.
[18] *Id*.
[19] *NLC Comments* at 18-19.

4. The Commission's speculations as to what defeats a concealment element, and its proposed approach to defining what is a stealth facility illustrate problems with the Order.

The prior interpretation of the term "concealment" had the virtue of being relatively simple to apply and leading to few real problems (and many positive solutions). The *2020 Draft Order* explains that "to 'defeat concealment,' the proposed modification must cause a reasonable person to view the structure's intended stealth design as no longer effective after the modification."[20] To illustrate this rule, the *2020 Draft Order* suggests:

> If a prior approval included a stealth-designed monopine that must remain hidden behind a tree line, a proposed modification within the thresholds of section 1.6100(b)(7)(i)-(iv) that makes the monopine visible above the tree line would be permitted under section 1.6100(b)(7)(v). First, the concealment element would not be defeated if the monopine retains its stealth design in a manner that a reasonable person would continue to view the intended stealth design as effective. Second, a requirement that the facility remain hidden behind a tree line is not a feature of a stealth-designed facility; rather it is an aesthetic condition that falls under section 1.6100(b)(7)(vi). Under that analysis, as explained in greater detail below, a proposed modification within the thresholds of section 1.6100(b)(7)(i)-(iv) that makes the monopine visible above the tree line likely would be permitted under section 1.6100(b)(7)(vi).[21]

The *2020 Draft Order* goes on to provide several other examples of things it states would not defeat a concealment element – including the addition of wiring to the exterior of a stealth facility. The problem with these speculations is that they have no conceivable basis in fact. A monopine that can be more than 20 feet taller than all surrounding trees would, in fact, stick out and expose the inherent weaknesses in concealment to all. Stealthing depends on consistency with surroundings in a variety or respects, including the proportions of various design elements to the structures that are to be mimicked. If the Commission intends for its proposed examples to be more than speculation, they would be arbitrary; and to the extent the draft is trying to be helpful, it fails to ground examples in realities. Even the wiring example, which may make sense

[20] *2020 Draft Order*, ¶38.
[21] *2020 Draft Order*, ¶39.

Fig. 4

when referring to a facility that will be some distance away from viewers, would have little application with respect to facilities in the public right-of-way, or on other structures with which the public may have close contact.

Further, the line the Commission proposes to draw between requirements that are merely aesthetic and those that are "concealment elements" elides the basic question: is the proposed change substantial within the meaning of Section 6409? It is hard to imagine that Congress meant to automatically authorize construction of faux trees well above the local tree line without any local review, or for that matter, any meaningful NEPA review.

More fundamentally, the Commission's proposed approach makes it critical that it make clear what it views as stealth and not stealth more concretely. One of the positive developments in siting has been the development of slim designs, and integrated pole designs that allow for (a) all elements of a facility to be contained within a single, monopole design; and (b) placement of wireless facilities with small form factor antennas that match the height of surrounding facilities. In some cases – and particularly in the large number of new developments where utilities are undergrounded and where there are no aboveground street lights (or none that could be easily converted to support wireless facilities) – the only aboveground facilities will be wireless facilities. Localities have reasonably been treating these designs as "stealth" or "concealment" designs that avoid the problems that would be created if applicants could depart from the

monopole-style design, or add ground cabinets. Figures 4, 5 and 6 are examples (Figures 5 and 6

Figs. 5 and 6

show before and after views of the same facility): in this case, both are street lights, but in an area without street lights, these sorts of facilities would be bare poles, without the street light armature. The Commission should be clear as to whether it views this type of concealment – which avoids obtruding antennas, visible wiring and other equipment – as stealth within the meaning of its rules. It should also be clear that integrated poles (like those in Figure 4) do not allow additional ground cabinets; and that facilities that may be required by an electrical provider (like a free-standing meter) do not either. Allowing the sort of expansion otherwise permitted by Section 6409 for such facilities may mean that these solutions are no longer options for deployment.

Note that the pictures also illustrate the problems with the Commission's proposed speculations as to what would defeat concealment: in either case, allowing a 10-foot increase in the height of the antenna would change the appearance of the structures dramatically, as would external versus internal wiring.

5. The proposed requirement for aesthetic-related conditions is improper and would negatively impact existing approvals.

With regard to conditions associated with siting approvals, the *2020 Draft Order* states that conditions associated with the siting approvals under Section 1.6100(b)(7)(vi) may relate to aesthetic concerns for non-stealth facilities, but there must be evidence that the initial approval was conditioned on the continued existence of the aesthetic feature or other means or reducing the facility's visual impact.[22] Still, the *2020 Draft Order* now explains that an aesthetic-related condition "cannot be used to prevent modifications specifically allowed under [S]ections 1.6100(b)(7)(i)-(iv) of Commission rules."[23]

In the past, when discussing the requirements under Section 1.6100(7)(b)(vi), the Commission said that it "only restricts a zoning authority's discretion subjectively to decide 'how large is too large'."[24] The Commission explained that the *2014 Infrastructure Order* "preserves the authority of States and localities to enforce concealment conditions."[25] These statements contain no suggestion that an eligible support structure has to be of a "stealth" design,

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[22] *2020 Draft Order*, ¶41. ("Conditions associated with the siting approval under Section 1.6100(7)(b)(vi) may relate to improving the aesthetics, or minimizing the visual impact, of non-stealth facilities (facilities not addressed under section 1.6100(b)(7)(v)). However, localities cannot merely assert that a detail or feature of the facility was a condition of the siting approval; there must be express evidence that at the time of approval the locality required the feature and conditioned approval upon its continuing existence for non-compliance with the condition to disqualify a modification from being an eligible facilities request."

[23] *Id*. at ¶43.

[24] FCC Respondents Brief at 41, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015), 2015, WL 4456506 (July 20, 2015).

[25] *Id*.

and they indicate that the limitation on local authority under Section 1.6100(b)(7)(vi) is meant to apply to size within the context of Sections 1.6100(b)(7)(i)-(iv) and not to concealment conditions.

The recent proposed "clarifications" from the Commission contradict its statement and example to the court in *Montgomery County* mentioned above, and the Commission does not address this discrepancy. Ultimately, the practical concerns discussed above apply here as well because a shift in the scope of what constitutes a "concealment element" versus an aesthetic-related condition of approval will have notable impacts on localities, and make initial approvals more contentious.

6. The proposed concealment rule is arbitrary and capricious.

When a federal agency changes existing policies, it must give a "reasoned explanation" for the change, "display awareness that it is changing position," and "show that there are good reasons for the new policy."[26] An "'[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'"[27]

As was shown above, the proposed concealment rule conflicts with prior Commission statements regarding what constitutes a "concealment element" and how concealment can be defeated, and the Commission does not explain the discrepancies. Rather, it classifies its actions as "clarifications," which implies that no change has occurred. If the Commission will not acknowledge that it is changing existing rules rather than further clarifying their meaning, then it cannot address the reasons and need for the changes. Therefore, the "[u]nexplained

[26] *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125-6 (2016) ("*Encino Motorcars*") (citing *National Cable & Telecommunication Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) ("*Brand X*") and *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) ("*Fox Television*").

[27] *Encino Motorcars, supra*, 136 S.Ct. at 2126 (citing *Brand X, supra*, 545 U.S. at 981).

inconsistenc[ies]" with the prior rule are sufficient to find the proposed concealment rule arbitrary and capricious.

7. The proposed concealment rule was adopted without the procedures required by the Administrative Procedure Act.

Commenters expressed concern with the process being used to amend the Commission's rules, and many issues persist in light of the *2020 Draft Order*.[28] When an agency is proposing an informal rulemaking, it "has an obligation to make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible."[29] Ultimately, "[t]he opportunity for comment must be a meaningful opportunity. That means enough time with enough information to comment and for the agency to consider and respond to the comments."[30]

Further, as we discussed in comments filed in this proceeding, "the agency must comply with the default repeal rules that are mandated either by statute or judicial order or such actions would not be 'in accordance with law.'"[31] As a result, the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."[32]

The Commission fails to meet these requirements. The *NLC Comments* explained that the Commission had failed to articulate its position when seeking comments on the industry proposals for change to the Section 6409 rules. [33] The *2020 Draft Order*, for the first time articulates the agency's positions (albeit in a manner that is inconsistent with prior rulings and unclear in critical respects). But there has not been a "meaningful opportunity" to comment on

[28] *NLC Comments* at 2-3.
[29] *Home Box Office v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977).
[30] *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450 (3d Cir. 2011) (quoting *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1101 (D.C. Cir. 2009)).
[31] *NLC Comments* at 2, fn. 7 (citing 5 U.S.C. § 706).
[32] *Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 101 (2015).
[33] *NLC Comments* at 2.

the rules that the Commission now proposes to adopt. The draft *2020 Draft Order* was released on May 19, 2020, before a holiday weekend; there was no notice and comment period; and ex partes had to be filed on or before June 2 – less than 10 working days later.

8. *The 2020 Draft Order conflates the process for approval for modifications that are not eligible facilities requests and modifications that are eligible facilities requests*.

It bears emphasizing that applications may be approved even if they are not eligible facilities requests. Under the existing 6409 rules, the process was relatively straightforward: if an application did not qualify (e.g., because it would defeat concealment elements), the applicant could have its application considered under rules that apply to non-eligible facilities requests. Now it appears that the Commission is mixing elements of the two processes. The Commission's proposed example regarding a setback requirement in San Francisco is an example of this issue.[34] It recognizes that the proposed rule defeats a valid effort at concealment, and therefore envisions that as part of the Section 6409 process, the City would now consider whether it is possible to comply with that standard and whether denial would result in an effective prohibition – considerations that ordinarily came into play outside of the eligible facilities request process. Mixing the two processes is necessary given the Commission's proposed approach, but the prior process was simpler, and preferable.

[34] *2020 Draft Order*, ¶43 ("In a similar vein, San Francisco has conditions to reduce the visual impact of a wireless facility, including that it must be set back from the roof at the front building wall. San Francisco states that it will not approve a modification if the new equipment to be installed does not meet the set back requirement. Even if a proposed modification within the thresholds of section 1.6100(b)(7)(i)-(iv) exceeds the required set back, San Francisco could enforce its set back condition if the provider reasonably could take other steps to reduce the visual impact of the facility to meet the purpose of its condition.").

B. The Proposed Equipment Cabinet Rule Is Not Consistent With the *2014 Infrastructure Order*.

1. The four-cabinet limit should be cumulative so that it can be squared with the plain meaning of the statute.

Section 1.6100(b)(7)(iii) states that a modification to an existing support structure is a substantial change if "it involves installation of more than the standard number of new equipment cabinets for the technology involved, but not to exceed four cabinets."[35] In the *2020 Draft Order*, the Commission states that the limit on equipment cabinets in Section 1.6100(b)(7)(iii) is the maximum number of additional cabinets *per eligible facilities request*.[36] The Commission argues that interpreting the text of Section 1.6100(b)(7)(iii) to be setting a cumulative limit on the number of equipment cabinets is incorrect because such an interpretation "ignores the fact that the word 'it' in the rule refers to a 'modification' and supports the conclusion that the limit on equipment cabinet installations applies separately to each eligible facilities request."[37]

The Commission's proposed reasoning is inconsistent with the Commission's interpretation of the same usage of "it" in other subsections of Section 1.6100(b)(7). For example, Section 1.6100(b)(7)(i) states: "For towers other than towers in the public rights-of-way, it increases the height of the tower by more than 10% or by the height of one additional antenna array with separation from the nearest existing antenna not to exceed twenty feet…."[38] The height increase limitations in Section 1.6100(b)(7)(i) are treated as cumulative, rather than allowing a 20-foot increase in tower height separately for each eligible facilities request.

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[35] 47 C.F.R. § 1.6100(b)(7)(iii).
[36] *2020 Draft Order*, ¶30 (emphasis added).
[37] *Id*.
[38] 47 C.F.R. § 1.6100(b)(7)(i).

Fig. 7

More importantly, the focus on the word "it" ignores the Commission's approach to deciding whether a change is or is not substantial. In the *2014 Infrastructure Order*, with regard to changes in height, the Commission rejected industry requests "to measure changes from the last approved change to the effective date of the rules" because "[m]easuring from the last approved change in all cases would provide no cumulative limit at all."[39] It did not impose a limit on the size of the horizontal structure that could be added because it noted that, because of the way it was measured, the standard did limit (albeit, in our view ineffectively) the permitted size of additions. In *Montgomery County*, the Commission addressed this point from the *2014 Infrastructure Order* explaining:

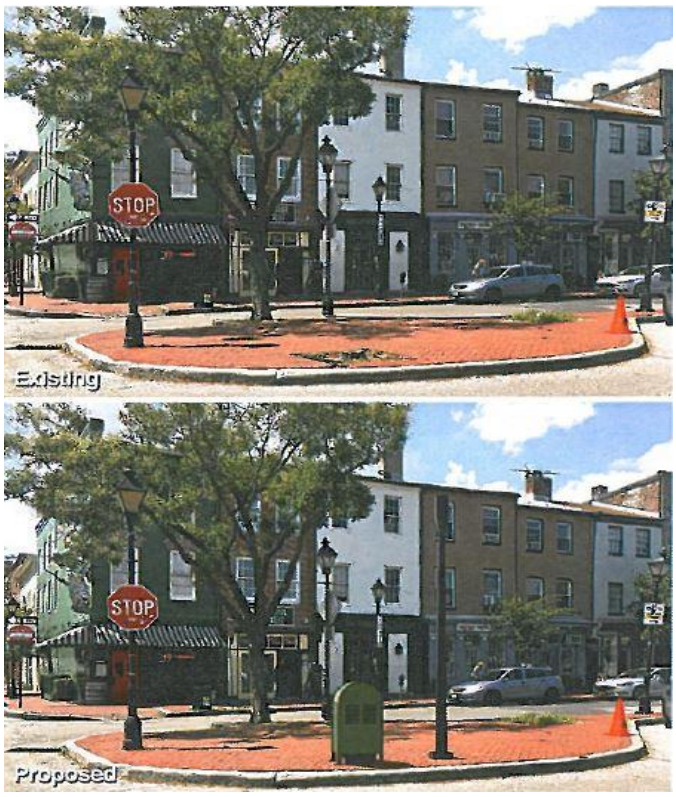
> ...[t]he [2014 Infrastructure Order] specifies that changes are measured from the dimensions of the tower or base station as originally approved, or as most recently modified with zoning approval prior to the enactment of the Spectrum Act – not, as industry requested, "from the last approved change," which the Commission predicted would create a daisy-chain that "provide[s] no cumulative limit at all."[40]

[39] *2014 Infrastructure Order*, ¶197.
[40] FCC Respondents Brief at 16, *Montgomery County v. FCC*, 811 F.3d 121 (4th Cir. 2015), 2015, WL 4456506 (July 20, 2015).

Focusing on the word "it" simply ignores the reasoning underlying the Commission rules. The proposed rule would allow a "daisy chain" effect, and there is no explanation as to why that is a logical interpretation of the Commission's rule or a logical application of the statute. The Commission should be well aware that multiplication of equipment on poles can result in dramatic changes to the dimensions of a facility, as illustrated in Figure 7. Under the draft, a community that approved a single cabinet on the pole on day 1 could be required to approve the others (in increments of four) through subsequent applications.

2. *The proposed equipment cabinet rule fails to account for the proposed concealment rule and to consider installations in the public right-of-way.*

The proposed equipment cabinet rule may cause further confusion when viewed in conjunction with the proposed concealment rule described above. The proposed concealment rule excludes from "concealment elements" any aesthetic-related features of non-stealth



Figs. 8 and 9

facilities. However, as suggested above, an approval for a facility may include both stealth and non-stealth elements. For example, an antenna may not be disguised at the top of an ordinary utility pole, but ground-based equipment may be disguised as a mailbox or garbage can. The following design (Figures 8 and 9) was proposed by Crown Castle in Fells Point, Maryland.

We would argue, consistent with the discussion above, that the pole itself should be treated as a stealth-type facility, but even if it were not, the proposed equipment cabinet certainly is, and multiplication of the cabinet (to look like multiple mailboxes) would defeat the purpose of the design – to fit into a relatively narrow island in a street. [41]

A related problem flows from the Commission's proposal to define "equipment cabinet" to exclude certain elements from the count of equipment that may be added to a structure as part of an eligible facilities request. One point of the equipment cabinet rule is to prevent proliferation in the number (and hence, the physical dimensions) of the facilities that are attached to a structure, or that are ground-mounted. The Commission seems to assume that one can easily exclude certain components without changing physical dimensions in some substantial way. That is not the case, and particularly not the case with 5G, where radio units and antennas may be combined in a single piece of equipment.[42] Figure 10 shows equipment installed on a pole prior to redesign, and post-redesign.

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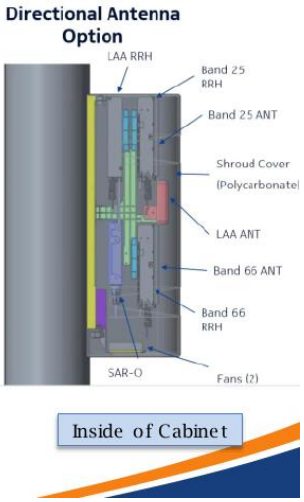
[41] Under the current test, there are critical elements that conceal the purpose of the facility depicted above – wiring is inside the pole, there are no boxes on the pole, and there are no extensions off of the pole. It is those elements that make this installation appropriate for this location, and that also disguise its purpose. To allow a box the size of the mailbox to be mounted on the pole would change its appearance dramatically; to add a 6-foot extension would do so as well. *See NLC Comments* at 20-21. We explain, in part, that "[a] horizontal extension of up to six feet, for example, would massively increase the size of a facility attached to a pole frequently only 12 inches in diameter, resulting in armatures either protruding over sidewalks, or monopolizing a narrow verge."

[42] Localities are asked to waive requirements for shrouding or placement of this equipment in equipment cabinets because of the effect on performance. The Commission should want to encourage that approach, rather than developing rules that ignore technological changes.

Before

After



Inside of Cabinet

Fig. 10

Prior to redesign, there is significant clutter, and the physical dimensions of the equipment occupies significantly more space, and is substantially more visible. After re-design, all of the equipment is in a single equipment cabinet, small enough so that it is actually concealed from view from the opposite side of the pole. This type of design ought to be encouraged – it will lead to simpler and faster approvals. The Commission's arbitrary exceptions from the count of equipment on a pole will not serve deployment goals, or the goals of the statute.

3. *The proposed equipment cabinet rule is arbitrary and capricious and does not comply with the APA.*

The proposed equipment cabinet rule suffers from the same flaws as the proposed concealment rule above. With regard to the proposed equipment cabinet rule, the Commission is not merely clarifying portions of the *2014 Infrastructure Order*, it is proposing to create new rules without acknowledging the changes or explaining the reasons for making them. Establishing that the four-cabinet limit is not cumulative would be a significant departure from the plain language of Section 1.6100(b)(7)(iii).

C. Other Elements of the 2020 Draft Order May Raise The Procedural And Substantive Issues Discussed Above, Unless Clarified.

1. The 2020 Draft Order may cause inconsistent application of the shot clock rules.

Section 1.6100(c)(3) states that the 60-day period for review "begins to run when the application is filed…."[43] In the *2020 Draft Order*, the Commission explains that for the purposes of the shot clock and deemed granted rules, an applicant's submission triggers the running of the shot clock when both of the following criteria are met:

> (1) the applicant takes the first procedural step that the local jurisdiction requires as part of its applicable regulatory review process under section 6409(a), and, to the extent it has not done so as part of the first required procedural step, (2) the applicant submits written documentation addressing the applicable eligible facilities request criteria, including that the proposed modification would not cause a "substantial change" to the existing structure.[44]

Further, the *2020 Draft Order* states that if a locality's "first step" is to meet with the locality's staff prior to filing any application, then the applicant can satisfy that first step "by making a written request to schedule the meeting—a step within the applicant's control."[45] Thus, the 60-day shot clock would start to run "once the applicant has made a written request for the meeting and the applicant also has satisfied the second of [the Commission's] criteria by providing the requisite documentation."[46]

One interpretation of the *2020 Draft Order* is that the shot clock could start even if a proper application that complies with a locality's lawful permitting process is not filed. For example, a city may have an application form specifically for Section 6409(a) requests and an established method by which the application shall be submitted, which includes a pre-application meeting. Under the *2020 Draft Order*, it can be argued that the shot clock could still run without

[43] 47 C.F.R. § 1.6100(c)(3).
[44] *2020 Draft Order*, ¶14.
[45] *2020 Draft Order*, ¶18.
[46] *Id*.

that application form being used as long as the applicant: (1) gives a written request, in no particular form or way, for the pre-application meeting; and (2) provides, in no particular form or way, the information required by Section 1.6100. Such an interpretation would be a departure from the plain language of Section 1.6100(c)(3) and is more than a mere clarification.

The Commission should state clearly that the shot clock can only start with the submission of the application required by the locality.[47] It should be submitted as required by the local code.[48]

In addition, the *2020 Draft Order* creates confusion as to the duty of an applicant to submit materials required to ensure compliance with other conditions that apply to modification of an existing facility. The *2020 Draft Order* seems to suggest that the only information that may be required to start the shot clock is the information required to determine whether the facility qualifies as an eligible facilities request, and the application may not be deemed incomplete because information related to other required permits is missing. In the *2014 Infrastructure Order*, however, the Commission suggested that safety reviews that might be associated with excavation, building permits, and other activities could occur either at the same time, or after siting approval. If done, or required to be done at the same time, then all information required for permitting must be submitted at the same time, and failure to submit all

[47] We recognize, of course, that an applicant may submit an application that omits information required by a local form. In such a case, the burden shifts back to a locality to issue a notice of incompleteness. But where there is a local form, or an ordinance lists the information that is to be provided, an application should use the form, or reference the ordinance, so that the locality can meet the deadlines that the Commission has established for local and state actions.

[48] What happens if an application cannot be submitted or an in-person meeting is required? We would argue that the question is whether the delay is permissible. Even the Commission recognizes that during an emergency there can be times where a moratorium allows applications to be deferred. It should be sufficient if the same process used for submitting other permits is followed. Ultimately, allowing an applicant to apply under processes that are not themselves unlawful delays is inconsistent with Section 6409.

of the required information prevents timely processing of the permit. There is also a conflict between the *2020 Draft Order* and the *Small Cell Order*. The *Small Cell Order*[49] suggests that on submission of an application, shot clocks begin running on all permits required to deploy; it follows that all materials relevant to an application must be submitted with the application.[50]

The inconsistencies created by the Commission's Orders cannot be squared, and the issue must be resolved. We posit that the simplest way to fix the problem is that the Commission should be clear that either (i) the deemed granted remedy only applies to the land use permit required, and not to any other permit, or (ii) the deemed granted remedy can only apply in a manner that permits deployment after the applicant has submitted complete applications for all required permits.

An additional issue that the Commission must resolve should it seek to change the *status quo* is whether its new shot clock rule effectively eliminates the notice of incompleteness procedure in Section 1.6100(c)(3)(i). Under the plain language of Section 1.6100(c)(3), the 60-day shot clock begins when the application is filed, and a locality has 30 days from receipt of the application to issue a notice of incompleteness. However, since the shot clock only starts under the new rules when the required "first step" is taken *and* all requisite documentation is submitted, a notice of incompleteness would not mean that the shot clock is tolled; it would actually mean that the shot clock never started running at all. The Commission should square the new rule with the language of Section 1.6100(c).

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[49] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 (2018) ("*Small Cell Order*").

[50] This, and other parts of the *Small Cell Order*, are being challenged as arbitrary and capricious. We do not mean to imply that the *Small Cell Order's* approach is correct. Rather, the point is that the Commission cannot *both* require all required permits to be issued simultaneously and allow an applicant to trigger a shot clock that applies to all permits without submitting *all* applications.

2. The Commission should clarify its proposed process for environmental reviews.

With regard to environmental review procedures, the *2020 Draft Order* clarifies:

> …an environmental assessment is not needed when the FCC and applicants have entered into a memorandum of agreement to mitigate effects of a proposed undertaking on historic properties, consistent with 36 CFR § 800.6(b), if the only basis for the preparation of an environmental assessment was the potential for significant effects on such properties. We expect this clarification should further streamline the environmental review process.[51]

Under 47 CFR Part 1, Appendix C, § VII.D, if the applicant "determines at any stage that an undertaking would have an adverse effect on historic properties within the APE(s), or the Commission so finds, the Applicant shall submit to the SHPO/THPO a plan designed to avoid, minimize, or mitigate the adverse effect."[52] The applicant must forward its mitigation plan to the Council and the Commission, and the Council indicates whether it intends to participate in the negotiation of the Memorandum of Agreement.[53] If certain actions are met, then the applicant, SHPO/THPO, and consulting parties shall negotiate a Memorandum of Agreement that is sent to the Commission for review and execution.[54] The Commission explains that per its current rules and process, even after the Memorandum of Agreement is executed and approved by the Commission, the project proponent must complete a second step, which is to prepare and file an environmental assessment in accordance with Commission rules.[55]

However, it is unclear whether the *2020 Draft Order's* clarification would remove the second step in the Commission's current process for environmental assessment that is mentioned

[51] *2020 Draft Order*, ¶45.
[52] 47 CFR Part 1, Appendix C, § VII.D.1.
[53] 47 CFR Part 1, Appendix C, § VII.D.2.
[54] 47 CFR Part 1, Appendix C, § VII.D.3-4.
[55] *2020 Draft Order* ¶45, citing https://www.fcc.gov/wireless/bureau-divisions/competition-infrastructure-policy-division/tower-and-antenna-siting.

above or merely explain that, in the Commission's view, an environmental assessment is not likely to be required. The Commission should be clear on that point.

We note that there is no basis for removing that second step. Indeed, the *2020 Draft Order*, which appears to federally authorize increases in the size of antennas above a treeline regardless of where they are located, seems to ensure that it would likely have adverse effects that cannot be addressed at the local level (another reason to preserve the concealment standards as they now exist). The *2020 Draft Order* itself would make changes without any adequate consideration of impacts.

Moreover, if the Commission intends to remove the second step in its environmental assessment process, then it needs to fully consider the potential emissions issues that may arise. In many cases, existing designs are approved that effectively limit the size of the radios that can be accommodated. If those facilities could now be increased in size as contemplated by the Commission's proposed rules, the radiofrequency (RF) patterns may be quite different, and may have very different effects on wildlife, particularly for facilities located near preserves that serve as migratory paths for birds, bees and butterflies.[56] This is so even if the facility meets the Commission's existing RF requirements. The point is that the Commission cannot eliminate or diminish its duty to consider environmental impacts or alter its procedures without a supportable analysis after appropriate notice and comment. The Commission should make clear that it does not intend to do so.

[56] *See* https://ehtrust.org/science/bees-butterflies-wildlife-research-electromagnetic-fields-environment/.

3. *The Commission should be clear that its discussion of street lights is not meant to refer to street lights and other vertical infrastructure owned or under the control of states or localities, as its prior rulings made clear that Section 6409 does not apply to those facilities.*

In the *2014 Infrastructure Order*, the Commission concluded that "Section 6409(a) applies only to State and local governments acting in their role as land use regulators and does not apply to such entities acting in their proprietary capacities."[57] In the *Small Cell Order*, the Commission acknowledged this prior ruling, but argues that it is not determinative because "the actions and analysis there were limited in scope given the different statutory scheme and record in that proceeding," [58] For purposes of the application of Sections 253 and 332, the *Small Cell Order* went on to adopt a different approach to regulatory/proprietary distinctions[59] purportedly based upon the particular circumstances surrounding small cell installations and public right-of-way management.[60] However, the Commission never suggested that it was changing its approach to the treatment of publicly-owned or controlled street lights (or other vertical infrastructure) that it had adopted in the *2014 Infrastructure Order* for purposes of the application of Section 6409.

It does not directly propose to do so in the *2020 Draft Order*, either. However, the *2020 Draft Order* gives a number of examples related to street lights, and its discussions of defeating concealment elements and aesthetic conditions may be meant to imply that street lights or other publicly-owned infrastructure are subject to modification under Section 6409.[61] The examples could also be viewed as hypothetical, or as applying to private street lights on private property.

Based on the foregoing, the Commission should clarify whether it is merely using these installations as an example of a larger point or whether it is attempting to subject city-owned or

[57] *2014 Infrastructure Order*, ¶239.
[58] *Small Cell Order*, ¶94, fn. 265.
[59] *See Small Cell Order*, ¶94, fn. 262.
[60] *Small Cell Order*, ¶94, fn. 266.
[61] *See 2020 Draft Order*, ¶38, Fn. 106, and ¶43.

controlled vertical infrastructure to modification under Section 6409. If it is the former, then it should say so. If it is the latter, then that position conflicts with the Commission's statements in the *2014 Infrastructure Order*. In such a case, the *2020 Draft Order* would not be "clarifying" this rule but rather would be extending the application of Section 6409(a) beyond a limitation previously set by the Commission, and in addition, the Commission would be exceeding its authority under the Communications Act, and under the Constitution, as discussed at length in the ongoing litigation surrounding the *Small Cell Order*.[62]

Indeed, application of Section 6409 to force a property owner to agree to modifications of its own facility grants the lessee property rights it would not otherwise have, and subjects localities to burdens (including planning, replacement, and maintenance of different infrastructure) that a locality may not wish to bear, or be able to bear. Further, what is true for localities generally is of course also true for vertical infrastructure owned by municipally- or state-owned utilities.[63] If the *2020 Draft Order* is adopted, a request to increase the size of an existing installation could defeat otherwise valid limits in a lease or license.

As is explained in more depth by the petitioners in the litigation related to the *Small Cell Order*,[64] the U.S. Const. amend. X prevents Congress from directly compelling states or their political subdivisions to enforce a federal regulatory program.[65] Subjecting city-owned vertical infrastructure to modification under Section 6409 would impede on a locality's proprietary property in the public right-of-way and elsewhere, and require that a locality permit any

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[62] Petitioner Brief at 76-85, *Sprint Corporation v. FCC*, No. 19-70123 (9th Circuit, Jun. 10, 2019), ECF No. 76.
[63] *See* American Public Power Association (APPA) Brief on the Merits, *Sprint Corporation v. FCC*, No. 19-70123 (9th Cir., Jun. 10, 2019), ECF No. 71; *see also* APPA Reply Brief, *Sprint Corporation v. FCC*, No. 19-70123 (9th Cir., Sept. 4, 2019), ECF No. 150.
[64] Petitioner Brief at 114-116, *Sprint Corporation v. FCC*, No. 19-70123 (9th Circuit, June 10, 2019), ECF No. 76.
[65] *See e.g.*, *Printz v. U.S.*, 521 U.S. 898, 925 (1997); *New York v. U.S.*, 505 U.S. 144, 161 (1992).

modification that qualifies as an eligible facilities request under Section l.6100. If the locality did not respond to or approve a qualifying eligible facilities request, the deemed granted remedy could be exercised, leading to an effective loss of control of the locality's property. The Commission must address this issue or clarify that publicly-owned vertical infrastructure is not subject to modification under Section 6409.

The related Fifth Amendment issue in more detail in the Petitioners' Brief in the *Small Cell Order* appeal.[66] Even if there were fair compensation, the Commission's compelled access and modification rules would be questionable: under the Fifth Amendment, a government taking has to be for a public purpose, and allowing a private party to use local government vertical infrastructure simply because it is convenient and cost-efficient for the private company is an insubstantial justification. Nor does the Commission have authority under the Commerce Clause or under the Constitution either to require localities to dedicate vertical infrastructure to wireless use or to require modification of that infrastructure as a condition of engaging in the activities like lighting local streets.[67]

III. THE 2020 DRAFT ORDER CANNOT BE APPLIED TO FACILITIES APPROVED UNDER THE COMMISSION'S PRIOR RULES.

When an agency is changing an existing policy and articulating the reasons for the change, it "must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'"[68]

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[66] Petitioner Briefs' at 106-113, *Sprint Corporation v. FCC*, No. 19-70123 (9th Circuit, June 10, 2019), ECF No. 76.

[67] *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926).

[68] *See Encino Motorcars, supra,* 136 S.Ct. at 2126 (quoting *Fox Television Stations, supra,* 545 U.S. at 515); *see also Smiley v. Citibank (S. Dakota)*, N.A., 517 U.S. 735, 742 (1996) ("Sudden and unexplained change…or change that does not take account of legitimate reliance on prior interpretation…may be 'arbitrary, capricious [or] an abuse of discretion.'").

Here, as was established above, the Commission's adoption of the *2020 Draft Order* would change multiple rules related to concealment and wireless installations without acknowledging the proposed rules or fully explaining the justification for the rule changes. We have explained the practical problems that the proposed rules will cause for localities, many of whom have approved numerous wireless installations. Those localities approved the initial installations in reliance on the prior Section 6409 rules, especially those related to concealment and equipment cabinets, with an understanding of how future modifications would look and be regulated. Those localities could not have foreseen the significant increase in the number of new equipment cabinets that will now be possible, for example, or have envisioned that concealment elements carefully developed to comply with Commission rulings may be defeated easily. The Commission must either clarify that the proposed rules would not apply to existing installations approved under its prior rules or reconsider the proposed changes "in light of the serious reliance interests at stake."[69]

IV. THE 2020 DRAFT ORDER IS INCONSISTENT WITH THE SMALL CELL ORDER ITSELF, AND REQUIRES RECONSIDERATION OF THE COMMISSION'S TEST FOR SUBSTANTIALITY.

A. The 2020 Draft Order Would Negate the Limits Imposed by the Small Cell Order.

The *Small Cell Order* adopted a definition of the term "small wireless facility," and is predicated on the notion that these facilities are substantially distinct from larger facilities, and can be approved with fewer concerns for effects on public or private property. The limits included height limitations, limitations on the size of facilities compared to adjacent facilities,

[69] *See Encino Motorcars, supra,* 136 S.Ct. at 2120, 2127; *see also Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n*, 921 F.3d 1102, 1114 (D.C. Cir. 2019) (holding that Commission's order was arbitrary and capricious because the Commission ignored serious reliance interests of providers who constructed business models and invested significant resources in Lifeline service and subscribers in its order directing Lifeline subsidy to facilities-based providers.).

and limitations on the total volume of antennas and equipment that could be attached to a supporting structure. [70]

Under the *2020 Draft Order*, an eligible facilities request modifying an existing antenna could exceed the size limitations established by the *Small Cell Order* if the existing facility was non-stealth. It could defeat otherwise valid aesthetic requirements if the aesthetic requirements would preclude alterations permitted under Section 1.6100(b)(7)(i)-(iv). Thus, if a locality imposed a condition that an antenna have a three-foot shroud, but a modification would increase the antenna size to four feet, the change would not be substantial if increase otherwise complied with the size limits in Section 1.6100, even though the increase could increase volume of the antennas far beyond the 3 cu. ft. which qualifies as a small cell, and potentially defeat the shrouding requirement (while the Commission intentionally uses as an example the replacement of a three-foot antenna with a four-foot antenna, under the modification standards, there would be no limit to the size of a replacement antenna).[71] Under the draft equipment rules, there is no limit to the total volume of the equipment that may be included on a pole. As Figure 7 and Figure 11 illustrate, there is real reason to suppose that modifications permitted under the Commission's draft rules would be large, unsightly, and diminish adjoining property values.[72]

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[70] 47 CFR §1.6002(l).

[71] *2020 Draft Order*, ¶43 ("If a city has an aesthetic-related condition that specified a three-foot shroud cover for a three-foot antenna, the city could not prevent the replacement of the original antenna with a four-foot antenna otherwise permissible under section 1.6100(b)(7)(i) because the new antenna cannot fit in the shroud. As described above, the city could enforce its shrouding condition if the provider reasonably could install a four-foot shroud to cover the new four-foot antenna. The city also could enforce a shrouding requirement that is not size-specific and that does not limit modifications allowed under sections 1.6100(b)(7)(i)-(iv).")

[72] *See* Petitioners' Brief at 19, *Sprint Corporation v. FCC*, No. 19-70123 (9th Circuit, Jun. 10, 2019), ECF No. 76 (citing Local Governments Excerpt of Record-405-415 (Comments Smart Communities, Exh. 3, Burgoyne Declaration)). Petitioners' Brief explains that "[u]nrebutted evidence showed that these large facilities reduce adjoining property values."

Nonetheless, the locality would not be able to deny the modification. The Commission would be effectively ignoring the line it drew between a facility of a size that requires substantial review, and a facility that is not. That result cannot be squared with the statute.

B. The 2020 Draft Order Requires Reconsideration of the Commission's Test for Substantial Change.

Should the Commission opt to change its approach to concealment elements, and to otherwise "clarify" its prior *2014 Infrastructure Order*, it must also consider whether the test for substantial change correctly limits permissible changes to those that do not "substantially change" the physical dimensions of existing facilities. In the *2020 Draft Order*, the Commission

Fig. 11

does not actually consider the effect of its changes on the test for substantiality. The draft considers only whether the changes will speed deployment. But the statutory test focuses first and foremost on the "substantiality" of changes, and the failure to consider the overall impact of the changes (or clarifications) on the sufficiency of the rule is a fatal defect.

There have been many significant technological changes since the adoption of the *2014 Infrastructure Order* that the Commission has acknowledged in prior orders. First, there has been a significant shift from deployment of macro-towers to the deployment of what the Commission characterizes as small wireless facilities, often mounted on shorter supporting structures. The Commission expects thousands of these structures to be deployed, many of them in the middle of residential areas, including residential areas where all other utilities have undergrounded at great expense. The facilities will be, as one might put it, "in the face" of residents. To those residents, it does matter if a facility starts as the size of the combined antenna/radio unit that can be hidden on one side of a pole (Figure 10), and ends up like the facilities shown in the picture at Figure 11. Yet, the *2020 Draft Order* often seems to assume that the changes it is suggesting are to facilities that are distant from residents, and have no impact upon them. The Commission needs to at least consider whether, its "concealment" should apply equally to facilities on private property and public rights-of-way; and in all areas of a community – residential, historically significant, or otherwise.

Second, with the proliferation of facilities in public rights-of-way and in residential areas, the Commission now has ample evidence that its draft rules will lead to substantial changes in the physical dimensions of existing facilities in thousands of cases. Some of the pictures

presented to the Commission are illustrative, but are far from the only examples.[73] The Commission's concealment approach and its approach to pre-existing conditions mitigated potential harms. Given the proposed changes, the Commission needs to consider whether it must also adopt a different approach to substantiality that takes into account all physical dimensions of a wireless facility, and at least limits the allowable increase from originally approved sites on a percentage basis. There is no reason to assume that the addition of a six-foot attachment to a street light or utility pole in a residential neighborhood, or the attachment of many, many equipment cabinets is either unlikely to occur, or amounts to an insubstantial change. There is no reason to suppose that expansion of ground cabinets to a size that prevents shielding is insubstantial.[74] This sort of approach, combined with other safeguards, is consistent with the approach in historical areas, where the Commission recognizes that increases in volume of individual elements, and in the collective volume of facilities may have significant adverse effects.[75] There may be other approaches that could be taken, but the existing approach, if modified as proposed, does not work as a means of drawing a line between substantial and insubstantial changes.[76]

[73] The pictures show, for example, that facilities may be of significant depth, intruding onto sidewalks, and significantly increasing visual harms in a neighborhood.

[74] For example, along the edge of a public right-of-way, an increase in height alone may simply require higher shrubbery, but an increase in depth may make shielding impossible. Where an increase in shielding and height can occur, it may be appropriate to afford eligible facilities request status.

[75] *2014 Infrastructure Order*, ¶¶92-93. There the Commission adopted limits on the total volume of equipment that could be associated with a wireless facility, in addition to volume limits for individual equipment enclosures.

[76] The Commission may not prefer the approach mentioned here, but at the very least, unless it can determine that the rules it plans to adopt will in fact have limited, adverse effects, it needs to issue a notice of inquiry or of proposed rulemaking.

V. CONCLUSION.

For the foregoing reasons, the Commission should not adopt the *2020 Draft Order*. Should it desire to revisit its test for "substantial change," it should commence an appropriate rulemaking process, offering sufficient time for parties to provide comments and for the Commission to consider and respond to those comments.

Respectfully Submitted,

/s/ *Gerard Lavery Lederer*
Gerard Lavery Lederer
Joseph Van Eaton
Gail Karish
Andrew McCardle
BEST & KRIEGER LLP
2000 Pennsylvania Avenue N.W., Suite 5300
Washington, D.C. 20006

Counsel for the Localities

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